IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1347 OF 2005

IN

ARBITRATION PETITION NO.395 OF 2004

Bharati S. Khandhar. .... Petitioner.

vs.

Yak Institute of Management Pvt.Ltd. ... Respondent

Mr.Berzin Somandy & Vinod Juwale, for Petitioner.

Ms.Yasmin Toray with D.A.Barot, for Respondent in support.

CORAM: D.K.DESHMUKH,J.

DATED: 3rd May, 2005

P.C.:-

1. This is a notice of motion taken out by the respondent in Arbitration Petition no.395 of 2004 for setting aside the order dated 10th October,2004. Perusal of the order dated 10th October,2004 shows that the respondent was not represented before the Court. Perusal of the record shows that there was affidavit of service dated 4.10.2004 filed by the petitioner stating therein that the respondent has refused to accept the notice. The learned counsel for petitioner has placed before me envelope wherein the notice from

the Court and copies of the proceedings were sent to the respondent for service, but the envelope came back with the postal endorsement “Refused”. He has also pointed out to me another notice sent which also came back with the endorsement “Refused”. The endorsement made by the postal authority that the respondent refused to accept the notice, creates presumption that the respondent was served with the notices. Perusal of the affidavit filed in support of notice of motion shows that except making a statement that the order was passed by the Court without serving the notice on the respondent, the respondent has not stated anything about the affidavit of service filed on behalf of the petitioner nor has the respondent stated anything about the endorsement made by the postal authority. This has happened because the respondent has approached the Court for setting aside the order without taking inspection of the record of the Court. Had the respondent has taken the inspection of the record of the Court, the respondent would have found that there was an affidavit of service filed on record and the respondent could have dealt with that affidavit of service in his affidavit filed in support of the motion. I asked the learned counsel for petitioner whether after coming to know about the order, before taking out this Notice of Motion, the respondent applied for taking inspection of the record of the Court ? She clearly stated that no inspection of the record was taken. When a litigant comes to know that the Court has passed an order adverse to his interest and he thinks that the order has been made by the Court without serving notice of the proceeding on him, before applying to the Court for setting aside that order on the ground that the order was passed without serving notice on

him, it is the duty of that litigant first to take inspection of the record to find out in what circumstances the order was made?, whether an affidavit of service is filed on record ? , by what mode, as per the affidavit of service, the service was effected ? etc. An application made by a litigant, in such cases, where a bald statement is made that he was not served with the notice, without dealing with the affidavit of service, in my opinion, should be rejected by the Court at the first hearing itself because such an application shows lack of seriousness on the part of the litigant. In the absence of any explanation about the endorsement made by the postal authority and the affidavit of service that is filed by the petitioner, the statutory presumption which is raised because of the endorsement of the postal authority, thus, is not rebutted. Therefore, there is no reason to set aside the order dated 10th October,2004.

2. It is further pertinent to note that the learned Counsel appearing for the petitioner has pointed out to me that there were four notices sent during the course of pendency of the petition in this Court, informing the respondent about the pendency of the proceedings. All the notices were sent by registered post acknowledgment due, and all the notices have came back with the endorsement “refused”. Thus, the material available on record clearly shows that the order dated 10th October,2004 was passed by the Court after due service of notice on the respondent, and therefore, I do not see any reason to set aside that order. Notice of Motion disposed of.